UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MELISSA TIERNEY, et al.,

Plaintiffs,

v. 14 Civ. 2926 (VEC)

SIRIUS XM RADIO, INC.,

Defendant.

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New York, N.Y.
November 7, 2014
2:30 p.m.

Before:

HON. VALERIE E. CAPRONI,

District Judge

APPEARANCES

VIRGINIA & AMBINDER, LLP
Attorneys for Plaintiffs
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(Case called)

THE COURT: Mr. Ambinder, this is your motion.

MR. AMBINDER: It is my motion. It will be Ms. Lusher who will be giving the oral argument today.

THE COURT: You are just here as an observer?

MR. AMBINDER: Just watching. I enjoy the show.

MS. LUSHER: Good afternoon, your Honor.

We have made a notice for court-ordered opt-in plaintiffs. We allege that the plaintiffs have submitted evidence that shows a common policy to replace paid workers with unpaid interns. We feel that the evidence we submitted shows that plaintiffs have alleged a common policy of that, enough to be generalized for notice to be sent to other potential complaints to advise them of this lawsuit, and that there is evidence of a highly centralized internship program that is controlled by the human resourced department at Sirius.

Specifically, as far as going to the evidence of the similar tasks that the plaintiffs performed, we have submitted job postings and blog postings from current and former interns that show that no matter the department and no matter the location, they performed similar tasks, and that these were tasks that were also performed by compensated employees in the same department where they worked.

THE COURT: Let me ask you, in that regard, it struck me that there was a lot of similarity, recognizing that if

you're working on the Howard Stern Show, you're probably going to be doing slightly different things than if you are working on NFL Today. Within sort of broad parameters, the people who were working on shows or in particular departments of programming, there seem to be general similarities in what they did.

But people who were working in what I would view as kind of the back office type of department, so HR or finance, I think either you or Jones Day gave me affidavits from somebody who worked in finance. That seemed to be very different. Those two groups of interns seemed to be doing different things.

Could you focus on that?

MS. LUSHER: Absolutely. I do believe that your Honor was right, as far as the programming and things like that, there are such commonalities, as far as running the soundboards, editing audio clips, screening on-show callers.

Some of the other tasks that these individuals performed also, though, were conducting research or inputting information that you could actually generalize to being date entry and conducting research for whatever the on-show callers were going to be discussing or asking questions about.

Those are also some of the things that our named plaintiffs, Melissa Tierney, did on the Howard Stern Show. She did research.

THE COURT: Assume you have got me on that.

MS. LUSHER: Okay.

THE COURT: Address, really, the distinction, though, between the departments that would be like HR and finance.

MS. LUSHER: Sure.

THE COURT: My old company would have been legal. That would be different than the people who are dealing with the radio shows themselves.

MS. LUSHER: Absolutely.

So I think some of the commonality is that, as the named plaintiffs and opt-in plaintiffs alleged, even the individuals in HR and finance are doing -- the overall theme is that they were performing tasks that compensated employees in their same department were performing.

These are also generally tasks of entry-level employees. So a couple of the people in the finance or HR department talked about using Microsoft Excel. They talked about doing data entry. You could say that there were also individuals that were in these other programming departments that were inputting data into computer databases. It may not have been Microsoft Excel spreadsheets, it might have been a different software program, but it was generally an entry-level task of an employee that would have been compensated in the department where they worked.

I think that was recognized by the court in Grant v.

Warner Brothers Music, and also pointed out by Judge Nathan in Mark v. Gawker Media. Actually, it is not pointed out in the decision, but in Ojeda v. Viacom, the named plaintiffs there, one of them worked in the web content department, where it was digital web marketing, that was Mr. Ojeda. The other named plaintiff, Ms. Reynaga, worked in the HR department in California. And that action was actually certified so that a notice could go out to the potential opt-ins.

In Grant, you had different individuals that worked in different departments, such as pop promotions, there was another individual that worked in the urban artist and repertoire division, someone else worked in the business analytics division. But, again, Judge Gardephe, in that case, found that the plaintiffs have showed a common policy that unpaid interns were doing the same work as compensated employees in their department.

And, in fact, in Grant, he specifically noted that the fact that the named plaintiff Grant's duties differed from one of the opt-in plaintiffs, Mr. Westerkon, was not what was the main inquiry. The main inquiry was whether or not the plaintiffs had put forth enough evidence to send out a notice to other plaintiffs saying that the common allegation was we have performed work in our departments that compensated employees worked, but we weren't paid.

I also think it is important to point out, this is

also in Grant, that the defendants uniformly made an exception for all unpaid interns without looking at the individual duties that they do. So they don't examine on a day-to-day basis what these individuals are doing, they just say you're automatically exempt. It is almost like, on the one hand, automatically exempting them without examining their different duties, but then on an opposition to a motion for 216(b), they want to highlight these differences. The court in Grant recognized that as well.

I think that another important factor is to show the highly centralized HR program. Here, they have submitted the affirmation from Bonnie Yuen, who concedes that the program is centralized through HR. HR originally screens these people. These people apply through a centralized website. The website has postings for all the locations where Sirius interns are going to work, then the website descriptions are the same, no matter if you're a music programmer in New York or you're a music programmer in Washington, DC, you're performing the same exact duties.

There are blog postings by interns that have performed internships in those particular areas, and they stay the same from year to year. The other interesting factor that we put evidence forth is that HR will put up job postings where some of these same tasks are being advertised in a paid employment position, but they're the same tasks that these interns have

been doing in their unpaid internship.

HR, once they evaluate the application, they make the first initial phone call, they screen the applicant, they go over their resume, they discuss with them what their interests are, they collect all of the internship request forms from the different departments, and then they decide who gets sent out to which department for an interview by that department.

The interns have to turn in weekly journal entries to the HR department. No department is allowed to hire an intern without HR's approval, so it is very highly centralized. They also, HR, has mandatory requirements that they tell the intern that they're going to be working a certain number of hours, a certain number of weeks, and that the internship is unpaid and for academic credit only.

All of this is handled through the HR department before it even gets to the department. This is a routine practice that happens with all interns, no matter where they're located in which department, and whether they're working for a channel or a show or whatever. These were things that were definitely recognized by the court in Ojeda. They were recognized by the court in Grant. It was also recognized by the court in Mark v. Gawker Media.

So this is the type of evidence that courts have looked at and realized that it was sufficient to -- I really like Judge Nathan's quote where she says that it is basically

enough evidence to show that you could generalize the same allegations to interns enough to send out a notice, just to let other individuals be aware that there's an action.

You know, one point that I would like to make that I think is important in these cases, is that interns work for a very limited amount of time. Sending out a notice, I think, in these cases is even more important, because if you only worked for someone for 15 weeks or 10 weeks, your claim is much more susceptible to expiration if a notice doesn't go out quickly so that you can stop that statute of limitations from ticking.

So that is all we want to do is to simply send out a notice to inform people of this. The only other thing I will touch on, unless you have any more specific questions, as far as the defendant's evidence goes, there are multiple decisions that talk about how the court isn't to examine credibility and to make factual determinations at this stage.

While courts have talked about how there is the 60 DOL factors and the examination of those of whether or not you qualify as an unpaid intern under the DOL factors. It is our position, along with several other courts, it's too premature to examine that at this point, because it does get into the merits of those arguments. Although the defendants have put forth affidavits from several people, four of those affidavits came from current interns, so it is our position that they're highly suspect because these are people that were conveniently

in the internship program at the time. There is no evidence as to whether or not Sirius has changed their internship program since this lawsuit has been filed. But these are also potential claimants, and they may not have realized what they were saying or what kind of rights they could be potentially releasing by putting in these affidavits.

Three of the other affidavits were put in by current Sirius employees, even though they don't say that. We submitted evidence to show those three individuals performed internships at one time and are now currently working for Sirius. They are reliant on Sirius for their employment. Of course, if found, in Gortat v. Capala Brothers, those affidavits can be highly suspect from current employees.

Then the last affidavit is from an individual who doesn't appear to be a current Sirius employee, but did a couple number of internships for Sirius. All I can say about that individual is he looked like he had a wonderful experience. It also looks like he may be still be tied in the industry. We have talked to a number of interns through several cases that people are afraid to come forward if they still have networks and contacts in the industry, and they're afraid to put their name out there.

We don't feel that the evidence that Sirius has put forth is enough that would warrant this court not issuing notice to people, just to let them know there is a lawsuit out

there that they can participate in. We do feel we have met the standard under the statute to warrant this first stage of the notice stage.

THE COURT: Thank you.

Mr. Mr. Lampe.

MR. LAMPE: Thank you, your Honor.

The plaintiff is seeking conditional certification and she does carry a burden of proof.

THE COURT: But you agree that it is a low burden?

MR. LAMPE: It is a low burden, your Honor.

THE COURT: Not no burden, but it is a low burden.

MR. LAMPE: It is a low burden, but it is not a nonexistent burden, and it is an evidentiary burden.

The Meyers, Second Circuit case, outlines what that burdens is. The plaintiff has to come forth with evidence sufficient to allow for an inference of a classwide policy or practice and sufficient to allow for the inference that the classwide policy or practice is unlawful in some way. That is the plaintiff's evidentiary burden.

The plaintiff's evidence in this case, your Honor, is very thin. There are four declarations, very short, very generalized, very perfunctory, that include language identical to language that this court has found insufficient to justify conditional certification.

The bulk of the rest of their evidence are blog posts,

not sworn testimony, not for the purpose of presenting evidence on issues relevant to conditional certification, but a series of blog posts. So while the plaintiff's evidence is thin, their ask is very big. You alluded to it, your Honor. They're asking for conditional certification that would extend to 168 different departments, channels, and shows, ranging from everything from on the department side to HR to IT, or to on the show side, The Howard Stern Show, where the plaintiff herself was an intern.

Our view is that the evidence the plaintiff has submitted is either not classwide or is either not even suggestive of anything unlawful. And I would like to go through, if I could some of the points that I think are very important to focus on.

First of all, there is this refrain mainly in the reply brief, but it is in the opening brief as well, about how the interns performed work done by paid employees. The plaintiffs seem to be making the point that that somehow or other is suggestive of something unlawful. That argument, your Honor, overlooks the seminal decision in this entire area of law, which is the Supreme Court's case in Walling v. Portland Terminal.

That case dealt with yard brakemen who performed the same work as paid employees. The Supreme Court in this case said, those yard brakemen qualified as interns, and the court

talks about what they did. They first observed the paid employees doing the work, then they moved to actually performing the actual work duties themselves under close supervision. The fact that in all four of the plaintiffs' declarations, they have a statement that says, I performed the same work as paid employees in my department, is of no legal moment. That is not disqualifying. It is not suggestive of anything unlawful, and that is all the statement is.

There is no factual support for what that means. They don't get into any of the details of it. It is just the bare naked statement, I performed the same work as employees in my department. So did the yard brakemen that the Supreme Court found to be interns as classified in the Walling case.

Let me turn to an allegation that the plaintiff raised in their brief about not working under close supervision. Plaintiff Tierney herself makes this allegation, but she has put forth no evidence that there is any sort of persuasive lack of supervision among the internship program. Of the four declarations submitted, two of them don't make that allegation; two do. So there is not even agreement within the four declarants as to whether or not they had very little supervision or very little oversight.

Plaintiffs' counsel are very experienced in these cases, your Honor. They brought a number of these cases. They definitely know what they are doing. And if those other two

interns who submitted declarations were able to say, I worked with very little supervision, I'm sure they would have said it. So there is no uniformity among the plaintiffs' witnesses with respect to that allegation.

Moreover, if you look at what Ms. Tierney says about her particular job, her allegations, your Honor, are that she spent most of her time running errands, getting breakfast orders, delivering food. It would stand a reason, if that were true -- and we are not conceding that it is -- if that were true, it would stand to reason that this did not require a lot of oversight. It didn't require a lot of supervision.

But she is a real outlier with respect to that. If you look at the other declarations that she submits, and you compare Ms. Tierney's duties to the other duties of her own declarants -- again, these are her own witnesses -- for two of those witnesses, Vitetta and Miller, there is zero overlap. Ms. Tierney identifies six or seven things that she does. Vitetta and Miller identify six or seven things that they do. Zero overlap; not a single item common.

Your Honor, to your point earlier about understanding or thinking there might be similarities and duties within the shows; Vitetta is in music programming, Miller was in the sports department programming.

THE COURT: Yeah, but to say there is no overlap, I think that you are overstating your case. While they may not

use the exact same language to describe what they were doing, I walked away from reading your affidavits thinking -- recognizing that they were working for different shows or different programs, they were essentially doing the same sort of low-level, entry-level radio show type work.

MR. LAMPE: Well, your Honor, if I can push back gently.

THE COURT: Sure. You can push back as hard as you would like. I don't take offense. Tell me what you're going to refer to.

MR. LAMPE: I'm talking about the Vitetta declaration. This is Exhibit H to the first Ambinder affidavit.

THE COURT: H?

MR. LAMPE: Some of these duties are not what I would consider grunt work, messenger work. Among the things that this individual did was preparing content to go on airwaves, adding new music, analyzing data, completing reports, completing forms for royalties, uploading and preparing content.

If you compare that to Ms. Tierney's declaration, she basically sounds and characterizes herself as a messenger: Running errands, placing orders, obtaining breakfast orders, delivering food items to on-air personality. She does say she reviewed news clips. She reported to on-air personalities and the only other things are compiling data and obtaining

signatures. These two individuals, both on the programming side, on the show side, are very differently situated in my view. I would ask the court to reconsider the degree of similarity, even within the people who are not on the department side, like HR, and procurement and the like.

There is, in the four declarations from the plaintiffs, your Honor, the common statement, it is identical in all four, it says: If I had not performed the various tasks I was assigned, Sirius would have had to hire a paid employee to do them. If you sub out the word Sirius for the word MSG, that is the exact statement in the exact declarations that this court in the MSG case found conclusory, unsupported, and incapable of justifying conditional certification.

That is not even as if that case came out after this declaration was submitted. The MSG case came out in May. Plaintiffs submitted this declaration with this sentence, which they, I am sure, view as significant, in July. So the court has already rejected this as a basis to justify conditional certification.

THE COURT: It is significant because you can't use an internship program to substitute for employees that you would pay.

MR. LAMPE: Judge Berman's point with respect to that is conclusory and it is unsupported. It is just a bare statement. No factual explanation for how they would know that

or what they mean by that. It is a bare naked assertion. And the Meyers case says, Second Circuit, that while they have a low evidentiary burden, unsupported assertions do not qualify.

Similarly, your Honor, there is the statement in all four of the declarations: I know that Sirius treated other interns in the same manner similar to me based on my observations as well as discussions we often had among ourselves. Sub out MSG for Sirius, and that identical statement was quoted and rejected in the MSG case by this court as insufficient to justify conditional certification.

Now, with respect to the similar work duties, plaintiff in their brief at the very beginning of their opening brief, pages three through six, they talk similarities of duty. If you read carefully those pages though, all plaintiff is able to say is that there are similarities within departments.

Plaintiff talks about how her duties in The Howard Stern Show are similar to other duties in The Howard Stern Show. She talks about how the duties in the music programming group in New York are similar to the music programming duties in Washington, DC. She talks about how the duties in talent relations, those duties are consistent over time.

Claiming that there is similarity within departments is a poor substitute for attempting to demonstrate similarity across 168 departments.

THE COURT: Would you concede that there is sufficient

evidence for a collective action for people that are in the radio programming department?

MR. LAMPE: No, your Honor, not even close. You agree it is a better case. The plaintiff can show more similar duties to be sure, but the Meyers case says there has to be evidence of commonality classwide and some indication that it is unlawful. The plaintiffs seem to think that they are doing the work of paid employees, that that makes it unlawful. This area of law is a little bit unsettled. There is nothing unsettled about the Walling Supreme court case. That was the case that performing the duties of the paid employees was not disqualifying. It stands to reason --

THE COURT: Do you agree you can't use a internship program to substitute what otherwise would be paid employees?

MR. LAMPE: I totally agree. That is certainly true. Plaintiffs have no evidence that that happened, other than those unadorned, conclusory statements that this court verbatim read, quoted, and rejected as sufficient. This case does not --

THE COURT: They haven't done discovery yet.

MR. LAMPE: I understand that, your Honor. The plaintiff is in charge of when they bring this motion. There has been no discovery. The court should hold the plaintiff to the plaintiff's evidence at this stage. And it wasn't our choice as to when the plaintiff would bring this motion, and

there is no evidence.

THE COURT: Of course not. On the other hand, for the most part, the courts allowed the collective notice to go forward before there has been full merits discovery.

MR. LAMPE: I understand that, your Honor. I certainly understand that. That is why Meyers says the burden is low. Meyers says there is an evidentiary burden. Nonetheless, the cases from this court talk about the fact that is a burden that should be monitored with some degree of care because there is a massive expansion of the litigation that is hanging in the bounds here. If the court issues notice, people opt into the case. That is expense, that's burdensome, that's time, and it is --

THE COURT: It is a balancing test, though. If, in fact, it is an unlawful internship program because Sirius is using volunteers to do the work that they would otherwise hire employees to do, doing it via collective action is considerably more efficient, from the court's perspective, than to do lots of individual cases.

I appreciate the burden on the company. I really do. I'm sensitive to the issue of that balance. The question really is whether they've gotten over what is a low threshold to get there.

MR. LAMPE: Our view is that they have not.

THE COURT: Understood.

MR. LAMPE: This case does not have the features that you find in some of the other cases that the plaintiffs are relying upon. For instance, Grant we heard quite a bit about. Grant was a case where the court indicated that every department, the different departments that Ms. Lusher referred to, they all had the identical position description.

In that identical position description was the statement that the interns, during the course of their internship, would work on a project to address business needs. You have commonality and you have arguable unlawfulness in this case. You don't have either here.

The position descriptions in this case are not the same. They are different. Every department, every position, they differ. The plaintiff has put a few in the record so the court can look at the difference between The Howard Stern Show and the music programming show internships; different duties, different responsibilities listed.

THE COURT: But how different are they really? I mean, your argument seems to me to the extreme that any company that has multiple departments kind of, per se, can be subject to a collective action because depending on how diligent their HR officers are, you're going to have somewhat different position descriptions.

So an introductory financial analyst is going to have a different job description than an introductory HR employee.

Surely you're not saying that those differences, in terms of what, from a department perspective, what an entry-level employee would do may flow down to what an intern would do, that that alone means their jobs are sufficiently different --

MR. LAMPE: No.

THE COURT: -- so it can't be a collective action?

MR. LAMPE: Not at all, your Honor. The plaintiffs don't have to prove the conditional certification case on position descriptions. They're not required to show similarity. This plaintiff can't. That's significant because she is claiming that there is similarity. I wanted to point that out. But I am certainly not arguing to your point, that that is the only way they can prove conditional certification.

The way that the plaintiffs in the cases that this plaintiff relies upon has shown has justified conditional certification in the past are things that are emanating from the company. The position descriptions in Grant that contain the reference to addressing business needs. In the Wang case --

THE COURT: Which case?

MR. LAMPE: The Wang v. Hearst with Judge Baer, internal company e-mail indicating that there was a need to cut back on paid messengers and that the gap would be made up with the interns.

THE COURT: Yeah, I like that case.

MR. LAMPE: There is no evidence like that here. The Black case, Fox Searchlight, there was a company memo in that case saying we need to scale back on overtime, we need to scale back on temporary paid employees, and the unpaid intern program would double in size. That would indicate arguably something unlawful, arguably something uncommon under the Meyers case.

This case doesn't have anything like that. Four cookie-cutter, perfunctory declarations containing language this court rejected. The plaintiffs' own experiences seem to be outliers, even within programming and shows. There is, I think, undeniably, very significant variance in the duties, not that the duties are conclusive either, but if Ms. Tierney was found to be an unpaid substitute for an employee on The Howard Stern Show because she ran breakfast orders, the other individuals that Ms. Tierney herself identifies in the record, such as I'm referring to Exhibit AA attached to the second Ambinder affidavit.

THE COURT: AA.

MR. LAMPE: Yes. This was submitted with the reply. Ambinder affidavit attachment AA.

THE COURT: Okay. This is the experience, not coffee?

MR. LAMPE: What I want to call attention to in particular is on the next page, your Honor. This is music programming. This is someone who you might otherwise try to compare, argue could be compared or allow plaintiffs to be

compared to Ms. Tierney.

This is an individual like many of the individuals who are going to go in an area directly relevant to what they're doing at Sirius. He indicates the student of the Connecticut School of Broadcasting that was given the basic skills and radio boards, and to earn the trust of the team and get to work on projects, such as cutting out video or audio from the day's program to screen calls.

This sounds an unlawful lot like Walling. He goes on in the paragraph, in the coming weeks, I will be familiarized with board operations and cutting promos, and I couldn't be more excited. He closes: The office atmosphere and in-studio excitement at Sirius is tremendous. I can't wait to continue this educational journey and see what lies ahead.

This is completely different from Ms. Tierney, who is fetching breakfast orders; undeniable difference. Intern Joel referenced in AA lines up squarely with Walling. This is plaintiff's own evidence your Honor. This isn't anything we submitted.

Again, I'll close with the point, the plaintiff bears a burden uniformly throughout the class. Some arguable suggestion that that common policy throughout the class is unlawful, and plaintiff has not establishes either of those elements here. It is a low burden, but it has not been met. We argue the motion should be denied.

Thank you, your Honor.

THE COURT: Okay.

Ms. Luncher.

MS. LUSHER: Thank you.

I would like to start out just by staying that, respectfully, all of the defendant's argues go to either merits or credibility, which this court is not supposed to examine at this initial stage of our motion.

I would like to distinguish some of the cases that have been pointed out. For example, in Black and in Wang, significant discovery had occurred in both of those cases. In Wang, they were moving for 216(b) conditional certification, but the defendants had made a motion to strike the class allegations, the collective and class allegations from the plaintiff's complaints so Judge Baer authorized them to do some discovery on the case. There hasn't been any discovery in this.

THE COURT: Right. But as your opponent points out, you decided when to make the motion for collective certification.

MS. LUSHER: Absolutely. That is true. But that is we are simply following suit of the way that courts in the circuit have talked about, how plaintiffs make this initial motion just to send out a notice because statute of limitations for individuals claimants are ticking every day.

The court doesn't have to make a determination on whether or not people are actually similarly-situated. The court looks at the evidence that is then submitted, which courts have said can be relied upon pleadings and affidavits of plaintiffs, to see whether or not they're similarly situated, a general rule to send out a notice. That is all we want to do in this case.

As far as Black, I think Judge Pauley did this wonderful treatment of Walling in that case. Walling v. Portland Terminal has been something that all of the courts have discussed. Again, I think that it goes to the merits and so the courts haven't gotten into the DOL factors.

If you do look at Walling, what happened there is the court decided that the Supreme Court decided those individuals were trainees under the law, which is slightly different from interns. But even given the defendant's argument about this, what happened is that the individuals were brought in for a week of training that the brakemen for the company had to stand back and watch these individuals while they went through the training. Then these individuals went into a pool. If they were later hired by the company, they actually got paid for that training that they were not paid for before. I think that is a significant difference in that case.

But I think, importantly, Judge Pauley points out that one the major things that the Supreme Court found was that the

Portland Terminal Company did not derive any immediate advantage from the trainee's work and that has been relied upon in case after case particularly with these intern cases, the company derives an immediate advantage, they should pay the interns.

THE COURT: What advantage did Sirius gain from the interns?

MS. LUSHER: These interns were performing work that the company either would have had an already paid employee perform or they would have had to hire someone to do them.

THE COURT: Let's talk about Tierney. So she seemed to be a gopher, doing a lot of gopher tasks.

MS. LUSHER: She did.

THE COURT: Maybe they would have hired somebody, or they would decided employees can get their own darn coffee.

MS. LUSHER: Maybe. I don't know if anybody wanted to tell Howard Stern to do that. I do think that she did some gophering tasks. The thing is that she also did some other tasks, as well such as compiling data for the show. She said she worked with eight other interns. These other interns could have been handling the call screening that a lot of these interns have talked about in their different declarations and their blog space. That seems be a very common thing.

In radio programming, it is a vital, integral part of that radio programming happening. If you have callers -- you

have people calling in all the time to these radio shows, a lot of them are talk shows, you know, and so somebody has to screen those calls. To me, that is an integral part of that day-to-day radio show.

You know, the other thing is we are only talking about five locations here. Sirius has buildings in five locations that are New York, DC, LA, Nashville, and New Jersey. While they may have multiple studios in the same building, these interns are working on multiple shows because they get booked, the studios get booked by different people in the same building. So you have interns doing the same things throughout the day in the same areas. They see other interns also doing those same things.

Some of them greet guests, whether music programmers got to greet them, get them coffee, whether they work in talent liaison and greeting guests or maybe escorting them to the show where they were going to speak, I do think there is a commonality.

I think that also Ms. Tierney may have been doing a little more gophering. She still was doing things that were integral to that show, that show that other interns that later on also worked for The Howard Stern Show also had to perform.

You know, the defendants didn't point out that our plaintiff, Mr. Goldberg, who worked in the Opie & Anthony show, very similar, it is an on-air personality show. He also

screened calls, but he also said that he got the crew breakfast, he got water and coffee for guests, he carried package and made deliveries in addition to his other tasks of archiving and cutting clips like some of the programmers do, take portions of advertising reads. A lot of these individuals would take audio clips and use them for promos and for contests.

So in our Exhibit AA, the one used to point out about music programming Intern Joel, part of his job duties were to cut up audios from the day's program, do call screening, and cut the audio for contest promos. Again, it is all similar tasks that these individuals were doing. Are they identical? No, they're not, but they are similar, and they are also basically grunt work that entry-level employees do.

And Sirius derived an immediate advantage from these individuals' work and that's what makes this different from the railroad brakemen in Walling.

This case is also different from MSG.

THE COURT: How to you distinguish MSG?

MS. LUSHER: MSG was also our case.

THE COURT: I know. A big disappointment for you guys, I'm sure.

MR. AMBINDER: It certainly was.

MS. LUSHER: I could say a lot about MSG. All I will say is that, you know, I think the court really focused on the

fact that there wasn't enough evidence of a highly centralized program. The individual that was a named plaintiff worked at a Rangers practice facility that was off site, as compared to the majority of interns tends that worked at Penn Plaza.

His tasks, the court found, were significantly different from the tasks that would be performed by the majority of interns that may have been working in the promotions department at Penn Plaza. I also think that the court really did focus on this highly centralized HR program but there just wasn't enough evidence of it that was submitted forth.

One of the hardest problems --

THE COURT: I'm sorry. That is the biggest difference between the record that you put together for MSG and the record you put together here is you focused on the centralization of the program via the human resources department?

MS. LUSHER: Absolutely. I think that the defendant's declaration from Bonnie Yuen backs that up tremendously. She admits they have control of everything.

Actually, this case is so much more like Grant and also Mark and also Ojeda, because I have to tell you, that in Grant and in Ojeda, those individuals, there were four or five opt-in plaintiffs in both of those cases, and each worked in a different department. As I already mentioned, in Ojeda, the two named plaintiffs, one of them worked in New York City in

the web digital development department, and the other one worked in California in the human resources department. Yet another opt-in plaintiff that worked in marketing in New York City, yet another individual that was in public relations in New York City, and then another person that worked in HR IS, which is like human resources information systems.

In Grant, you had four plaintiffs. You had one that worked in -- that was the named plaintiff -- and he worked in the pop radio promotions department. You had an opt-in plaintiff that worked in product department and business analytics. You had an individual who worked in promotions and video. And then another individual that worked in the urban section of the artist and repertoire department.

THE COURT: What?

MS. LUSHER: Artist and repertoire.

THE COURT: Artist and repertoire.

MS. LUSHER: These individuals all testified to having worked in different departments in different locations, they have different supervisors, but that is where I think that Judge Gardephe really honed in on the fact that it didn't matter that they were performing different tasks. The similarity was they were all performing entry-level work that compensated employees in their department performed. That's all the plaintiffs had to show was that was the common allegation that violated the FLSA. That is all that had to be

shown to send out a notice to people just to say, We have a case; if you want to join, you can.

But your statute of limitations is ticking, as I said before. These aren't long-term employees just going to lose a few weeks off the claim. You have individuals, the summer individuals, that interned over three years ago, they can't be a part of the class anymore.

THE COURT: Right. So let me ask you a question. If I were to agree that the case should be certified, one of the things that the plaintiffs had asked for is information on Social Security numbers of the class members.

MS. LUSHER: We will drop that.

THE COURT: Okay. Thank you. But let me ask my question.

MS. LUSHER: Okay.

THE COURT: What have you done with the Social Security numbers?

MS. LUSHER: Part of what we want, the sole reason we wanted the Social Security number is for a skip trace to be performed. What we have done in other cases is, you don't have to give it to plaintiff's counsel. There can be a confidentiality agreement with the claims administrator, where the claims administrator is provided with Social Security numbers, so that when a notice gets returned -- these individuals move around so much, right? They're college

students.

THE COURT: Yes.

MS. LUSHER: So oftentimes they may give a home address of parents. They may give a school address. It can be difficult to --

THE COURT: Find them.

MS. LUSHER: -- to find them.

So we have asked courts before for Social Security numbers. I guess I jumped the gun too quickly. Sometimes there can be privacy concerns, and we recognize them.

THE COURT: Yes.

MS. LUSHER: We have had, in the Viacom case actually, the court required that the claims administrator sign a confidentiality agreement and that the Social Security numbers were given to him to simply to perform a skip trace of the individual to find a proper address to make sure that notice was received by that person.

THE COURT: All right. At least I understand.

MS. LUSHER: Right. That was only after the notice had been returned, as they were provided. Once the notices would come back, then the Social Security numbers would be given of those individuals.

THE COURT: Understood.

MR. LAMPE: Very briefly, your Honor.

Again, on the Grant case, there might have been

disparate positions there, but there was a common company issue directive that all of the interns would serve business purposes. There is nothing like that in here.

With respect to the HR department in this case --

THE COURT: You will agree it is centralized? Sirius runs a centralized internship program?

MS. LUSHER: You can put that label on it. To some degree it is true, some not. Let me explain.

THE COURT: Okay.

MR. LAMPE: Centralized in the sense that the HR department is a central facilitator of the program, yes. There is one website. They don't apply on multiple websites or send out envelopes to multiple mail drops. One website. HR does an initial screening and does inform the intern candidates of the basic rules.

But then it goes to the departments, the channels, or the shows. Those are the people that do the interviewing and the selecting. And most importantly and most relevant for this case, that is the departments and channels and the shows that develop the program for that intern specific to their circumstances.

THE COURT: Well, but within the policy and parameters as set by HR. So if they wanted to pay their intern, even if they wanted to, the Sirius internship is a unpaid internship program that has to involve school credit, right?

MR. LAMPE: Correct.

THE COURT: There are limits to the flexibility --

MR. LAMPE: Yes.

THE COURT: -- of a channel.

MR. LAMPE: There is a framework and it is in the declaration. The framework includes, for example, that the channels in the departments and their shows must train, teach, supervise, and provide feedback, must evaluate.

THE COURT: Sounds like they got good legal advice what they were supposed to put in that policy.

MR. LAMPE: The policy is, nonetheless, is centralized as they are not to be fill-ins for regular employees, they are not to do essential day-to-day functions.

THE COURT: So it says that, but I have to say that, from a radio perspective, answering the phone and doing these audio cuts and things like that, strike me as central to what the business of Sirius -- I don't subscribe to Sirius, I have had rental cars with it. I have an idea.

MR. LAMPE: I come back to the Walling rationale. The fact that they're doing jobs that are essential, the brakemen in Walling, the brakemen job is a central job. The Supreme Court said they could be doing the work through observation and then actually doing that job under close supervision.

So any of these functions that counsel is describing from doing cuts of clips to doing promotions work to doing HR

work or to do any sort of work on the shows, production of the shows themselves, you can certainly imagine that there could be the experts who do this, who allow the interns to do it while they watch.

That's not to say that they're eliminating any need for the paid employees. The paid employees, they have to be mentors. That is another one of the HR guidelines. There has to be a mentor to do all this.

THE COURT: Mr. Lampe, your reading of Walling, it seems to me, essentially eviscerates the law relative to interns, because you're saying Walling is so broad, that you can't have interns that are servicing the needs of the company, and that's fine.

MR. LAMPE: The key --

THE COURT: Where do you draw the line?

MR. LAMPE: The key, your Honor, is supervision. Walling referred to close supervision. So you can imagine the main person stands back, he would otherwise have been doing it, he stands back and he watches the intern and he gives them pointers to teach them.

THE COURT: But for that relationship, the guy would be with the brakemen.

MR. LAMPE: Exactly, your Honor.

THE COURT: So they're not really getting any benefit. The company gets no benefit from that. They have got the guy

on board standing right there that would otherwise pull the switch.

MR. LAMPE: And, in fact, arguably impeding the operations, to some degree.

THE COURT: That is not how I read what's happening there.

MR. LAMPE: Well, there is no evidence from plaintiffs about what happened, your Honor. That is my point. All they say is that one unadorned, unsupported statement, very short in the four declarations, I did work that paid people did. It is the plaintiffs' burden. They did not go on to say, i.e, no one was supervising me, no one showed me how to do it.

THE COURT: A couple of them -- it doesn't have to be no one shows you how to do it.

MR. LAMPE: No one supervised, even among their four declarant witnesses. Two don't say that.

THE COURT: Two do.

MR. LAMPE: Two do. They have to show under Hearst commonality classwide. We are talking about a very large diverse group here, and half of the --

THE COURT: How many interns did they hire per term?

MR. LAMPE: I don't have the exact figure, but I think it is around 100, perhaps.

THE COURT: It is 100 in these five locations?

MR. LAMPE: Combined, I think, yes.

THE COURT: So you have essentially got five locations, maybe 20 employees, but it may not be average, maybe more in New York and LA, and fewer in Nashville and New Jersey.

MR. LAMPE: I think there would be more interns in New York than the other places.

THE COURT: Okay. There is.

MR. LAMPE: There is roughly 1,000 class members in this case over a three-year period. I don't have the exact number, but it would be a large and very diverse group.

THE COURT: Do you have a sense of how many are -- I would think, if you want internship at Sirius, the reason you want an internship with Sirius is you want to go into the radio business. The majority of the interns are in operative jobs, as opposed to HR or finance-type jobs.

MR. LAMPE: I don't have that breakdown, your Honor. I'm sorry.

THE COURT: Okay.

MR. LAMPE: But, again, the point I come back to is, the plaintiff bears the burden. The plaintiff had an opportunity to distinguish this case from the Walling case. The plaintiffs' evidence doesn't really distinguish it at all.

It certainly doesn't prove that the Walling facts are applicable either. It is plaintiffs' burden and the plaintiffs have not satisfied the burden.

Thank you, your Honor.

THE COURT: Okay. Anything else?

MS. LUSHER: I mean, if your Honor has any specific questions.

I will say that I do think that we have gone above and beyond our burden. We have shown that there are similarities in the tasks people do by having declarations from New York and DC and showing job postings in New York and other locations that are all identical. This is the same evidence that was submitted in the other cases where notice was sent out.

While there may be some slight differences between what these individuals could have been doing, whether it was in HR or whether it was in a radio programming show, the common factor is that they were doing work that the company derived an immediate advantage from and that they would have or did have paid employees diagnose the exact same work next to the unemployed intern.

I respectfully disagree with my adversary's treatment of Walling, just because in Walling, the major thing was that the company did not derive any immediate advantage. I do think this goes to the merits. Also, Walling was a vocational training program. The company's operations were impeded because they couldn't operate during that time. They just had a week-long training program for people they could put into a pool to later hire from later that they paid.

It is a different situation than having interns come

in, perform work that is integral to this company's business, not paying them, and then also that the company derived an immediate advantage from their work.

It is not a vocational setting here. There is not an educational structure. You walk in, you do radio programming, you screen calls, you edit audio clips, the same thing I could be doing if you hired me for an entry-level job.

THE COURT: I think part of the defendant's objection is that, other than the two affidavits saying I wasn't supervised or I wasn't highly supervised, there is not the equivalent -- the defendant's arguments is, for all they know, the person who is sitting there answering phone calls has a Sirius employee sitting right next to them listening to what they're doing on the phone so that it is the equivalent of the Walling brakemen standing next to the trainee brakemen and, therefore, the company is not getting any benefit, they're just letting the intern learn how to do what their employee would otherwise be doing.

MS. LUSHER: I think it would have been more like Walling had the company had a fake setup where it is like a vocational school, we are going to have a fake studio, you have people sitting in there while I practice.

If your Honor is the on-air personality, I am the intern screening calls, Mr. Ambinder is the supervisor sitting next to me telling me what to do. It is not live with Opie &

Anthony. It is not live with Howard Stern. This is a practice situation. That's a vocational school. That's an educational setting. There is the, oftentimes, a classroom component when it is an educational setting, and some internship programs do have a close classroom component.

Again, the Supreme Court decision, while it has been brought up in all of these intern cases, the closest thing we have right now was really a trainee exception under the law, not an unpaid intern. There are six factors in that test that were derived from Walling. It is with close supervision may be one of those factors, but whether or not the internship was for the benefit of the intern and whether that company derived an immediate advantage or its operations were impeded are also very important factors that have to be considered.

THE COURT: I need about 10 minutes and then I'll let you know what the answer is.

MS. LUSHER: Okay.

(Recess)

THE COURT: Thank you.

In light of your submissions and what I have heard today, I am prepared to make a determination on the plaintiff's motion. I am going to grant the motion insofar as it seeks authorization to send a notice to the putative group. As I will discuss in a minute, I have some concerns about the notice that the plaintiffs propose, so the parties are directed to

meet and confer on a proposed notice.

As you know, this motion focuses on the first step of a two-step method for determining the appropriateness of FLSA certification. Plaintiffs' burden at this stage "is modest but it is not nonexistent." That is from Fraticelli v. MSG Holdings.

While the modest factual showing cannot be satisfied simply by unsupported assertions, it should remain a low standard of proof because the purpose of this stage is merely to determine whether similarly-situated plaintiffs do, in fact, exist. That is from the Grant case.

Plaintiffs can meet their burden by presenting evidence that there are other individuals with similar positions, job requirements, pay provisions, and the like. There must be an identifiable, factual nexus which binds the named plaintiffs and the potential class members together as victims of a particular practice. That's from the Mark v. Gawker Media case.

At a later stage, on a more developed record, the named plaintiffs will be required, of course, to prove that the opt-in plaintiffs are, in fact, similarly-situated to the named plaintiffs. At this preliminary stage, however, the real question is whether Sirius', quote, policies or decisions likely allow a single answer to the question of whether the interns were treated more like ordinary employees or instead

students or trainees. That's from the Mark case. My answer in this case is yes.

In similar cases, courts have relied on the Department of Labor's six-factor test to indicate what factors may be relevant to the merits inquiry, therefore, to identify questions to which members of the putative collection should have similar answers. That's from both Mark and Grant and Fraticelli.

Also relevant is the Supreme Court's decision in Walling v. Portland Terminals, which we have discussed at some length, in which the court laid out the scope of the definition of employee excluding individuals who, without promise or expectation of compensation, but solely for purpose or pleasure, worked in activities carried out by other persons either for their pleasure or profit.

The parties are familiar with the six factors identified by the Department of Labor, so I will not repeat them. The DOL factors are most important at this stage in helping to assess whether the answers to each question would be more or less the same across the putative collective. Recognizing that, in any large endeavor, no two interns will have exactly the same experience. The defendants rely on Judge Furman's determination in Fraticelli by arguing that the interns varied placements meaning that their internship activities are too different to merit similar treatment.

In Fraticelli, Judge Furman, analyzing interns who worked at Madison Square Garden, wrote that, "The MSG interns have worked in approximately 100 different departments and their experiences appear to vary greatly from one department to the next in ways that are highly relevant to the Department of Labor's factors."

Unlike Fraticelli, however, the record in this case does not include the lead plaintiffs concession, quote, that the activities he performed were entirely different than those of other interns because his department was very different. Instead, Melissa Tierney, alleged that other interns performed many of the same tasks that she was assigned, and that Sirius treated other interns in a manner similar to how she was treated. I assume that defendants are right that the work that the interns performed differed to some extent depending on the department, channel, or show to which they were assigned.

Finance interns, like Andrew Vong, spent more time working with spreadsheets than their counterparts on The Howard Stern show, like William Latin. But as Judge Gardephe wrote in Grant, "The court routinely authorized notice in FLSA actions even where potential opt-in plaintiffs worked at different locations and performed somewhat different duties and are managed by different supervisors."

The similar cities across the Sirius internship program must only constitute a, "modest factual showing," that

Sirius' internship program was a common policy or plan that violated the law. Like the internship programs at Gawker, Viacom, and Warner Music Group, Sirius' program is run through a centralized website that lays out the requirements for interns and permits applications to each of the companies' offices. Websites like this imply that applicants were evaluated according to common criteria and may have been subject to common policies. Thus like Mark, Grant and Ojeda, courts all found court-ordered notice to be appropriate.

Moreover, defendants present a declaration from Bonnie Yuen, the manager of the internship program at Sirius XM Radio. Ms. Yuen lists a number of policies that apply to all Sirius interns, including the requirement that an intern must receive academic credit to participate and that all internships occur on Sirius' centralized schedule, which provides for three annual sessions.

Ms. Yuen further notes that Sirius' HR department calls all potential interns to inform them that the internship is unpaid, that a school must provide academic credit, and that the student must work a minimum number of hours approximately 20 to 30 hours per week.

The evaluation process for all interns is the same and interns are all required to submit journal entries to human resources. Ms. Yuen describes a number of other policies, some of which may ultimately favor the defendants on the merits, but

all of which constitute centralized policies regarding Sirius' internship program. This stands in contrast to Fraticelli, where the evidence of a centralized MSG wide policy was only a copy of the code of conduct that applied to all MSG employees, standardized time sheet with intern at the top, a script that interns were given to help manage telephone calls.

In Grant, Judge Gardephe concluded that similar evidence to what we have in this case made it reasonable to infer that the policy of classifying student works and unpaid interns, and thus except from the FLSA wage and overtime requirements, reflected a national companywide policy.

The same is true here. Defendants will have the opportunity to move to decertify the collective after the close of discovery. But for now, plaintiffs have made the modest showing that the first stage requires. As to the method and content of the proposed notice in context, the plaintiffs' papers have indicated that they are happy to work with the defendants on the content of that notice, and I will encourage to you do so. It seems to me that the notice can be sent by U.S. mail and by e-mail, it is not clear to me why it is necessary to text it. I would just note that.

I also think that the notice should inform the potential opt-in that they may well have to provide discovery, that this is not a completely painless process if they opt-in, there may be some cost associated with being a plaintiff in the

lawsuit. They should also provide contact information for defense counsel, just in case they want to hear from their employer or their potential employer before they make a decision whether to opt in. Beyond that, I don't have any other thoughts on the notice.

How long will it take the parties to meet and confer on a revised notice?

MS. LUSHER: Two weeks, your Honor.

THE COURT: Is two weeks acceptable?

MR. LAMPE: That's fine, your Honor. Thank you.

THE COURT: That takes us to November 21. If the plaintiffs can send a revised notice on November 21, preferably that is on consent, but if not, if also on the 21st, if you can send me your objections to their notice.

MR. LAMPE: Yes, your Honor.

THE COURT: Anything further?

MR. AMBINDER: No, your Honor.

MS. LUSHER: No.

MR. LAMPE: No.

THE COURT: Thank you all very much.

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